Jet Electric Company, Inc. *and* Local Union 342 of the International Brotherhood of Electrical Workers, AFL–CIO. Case 11–CA–18395

August 10, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

Upon a charge filed by the Union on July 2, 1999, an amended charge filed on September 30, 1999, and a second amended charge filed on October 26, 1999, the General Counsel of the National Labor Relations Board issued a complaint on October 29, 1999, against Jet Electric Company, Inc., the Respondent, alleging that it violated Section 8(a)(3) and (1) of the National Labor Relations Act. The General Counsel filed an amended complaint against the Respondent on February 26, 2001. Copies of the charges, complaint, and amended complaint were properly served on the Respondent. By letter dated March 20, 2001, and received by the Region on March 22, the Respondent's president denied all complaints directed at the Respondent.

On April 17, 2001, the Acting General Counsel filed a Motion for Summary Judgment with the Board. On April 20, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by a letter dated March 14, 2001, and by a telephone call on March 21, 2001, notified the Respondent that unless an answer was received by March 26, 2001, a Motion for Summary Judgment would be filed.

On March 22, 2001, the Region received a letter dated March 20, 2001, from Respondent's president in the mail. In the letter, the Respondent's president asserted, "I deny all complaints directed at me, James A. Jackson, or my company Jet Electric Co., Inc."

We find that the Respondent's pro se letter, dated March 20, 2001, does not constitute a proper answer to the complaint allegations under Section 102.20 of the Board's Rules and Regulations because it fails to address any of the factual or legal allegations of the complaint, and therefore is legally insufficient under the Board's Rules. See *Eckert Fire Protection Co.*, 329 NLRB 920 (1999) (pro se letter from company president denying "all charges referenced" in complaint insufficient answer under Board Rules); *American Gem Sprinkler Co.*, 316 NLRB 102, 103 (1995) (respondent's apparently pro se answer stating that it does not "agree with the Union's position" too vague to constitute an acceptable answer).

In the absence of good cause being shown for the failure to file a sufficient answer, we grant the General Counsel's Motion for Summary Judgment insofar as the amended complaint alleges that the Respondent has committed violations of Section 8(a)(1) and (3) of the Act.[1] One of those alleged violations, however, is an unlawful refusal to hire eight discriminatee applicants on various dates in 1999. Although we agree that the undisputed amended complaint allegations are sufficient to prove a refusal-to-hire violation under the standard set forth in *FES*, 331 NLRB 9 (2000), the allegations are insufficient to enable the Board to determine the appropriate remedy.

In this regard, the Board held in *FES* that "in cases involving numerous applicants, the General Counsel need only show that one applicant was discriminated against to establish a refusal-to-hire violation warranting a cease-and-desist order." Id. at 14 In order to justify an affirmative backpay and reinstatement order, the General Counsel must further show the number of openings that were available. "Proof of the availability of openings cannot be deferred to the compliance stage of the proceeding." Id. "Where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings." Id.

The amended complaint here alleges that the Respondent "filled job openings" at all material times and that it refused to hire the eight named discriminatee applicants because they engaged in concerted protected union activities. We find these undisputed allegations sufficient under *FES* to establish a refusal-to-hire violation warranting a cease-and-desist order. The complaint does not otherwise specify how many openings the Respondent had available. Consistent with *FES*, the General Counsel bears the burden of proving the availability of openings

[1] We further emphasize that the Respondent failed to file a response to Notice to Show Cause why the Motion for Summary Judgment should not be granted Motion for Summary Judgment.

at the initial unfair labor practice stage of the proceedings. We shall therefore hold in abeyance a final determination of the appropriate remedy for the Respondent's refusal-to-hire or consider for hire violations pending a remand of this case for a hearing before an administrative law judge on the limited issue of the number of openings that were available to the discriminatee applicants.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a North Carolina corporation with jobsites located in Winston-Salem, North Carolina, has been engaged in electrical contracting. During the 12 months preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received at its Winston-Salem jobsites goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6),and (7) of the Act and that the Union, Local 342 of the International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since on or about January 2, 1999,[3] the Respondent, through its president, agents, and supervisors engaged in the following conduct: threatened not to hire employees because of their affiliation with the Union (President James A. Jackson on about February 12, 15, and 19, June 9 and 17; Foreman Tim Gilleland, on about March 16); threatened to interrogate employees regarding their union affiliation (President Jackson on about June 9); advised employees and applicants that union-affiliated employees would not be hired .(President Jackson on about June 9; Superintendent Greg Hill on about February 16; and Foreman Gilleland on March 16); threatened to discharge employees for their affiliation with the Union (President Jackson on about May 5 and June 9; an unidentified foreman on about May 5); and interrogated employees regarding their union affiliation and membership (Superintendent Hill on about February 16; President Jackson on about February 19, March 10 and 15, May 5, and June 17; Foreman Tony Heath on about June 17; Foreman Gilleland on about March 16; an unidentified foreman on about May 5). By each of these acts, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

On about February 23, the Respondent changed its hiring practices and policies in order to deny employment to union-affiliated employees. In addition, on about the dates indicated, the Respondent refused to consider for hire, and failed and refused to hire, the following applicants: Rodney Booe (February 17); Stanley Grace (February 19); Jerry Loftis (February 23); Roger Stanley (March 10); Douglas Summers (March 15); Allen Craver (March 16); Gary Maurice (April 28); and Percival Millington (May 5). At all material times, the Respondent was filling job openings at its Winston-Salem, North Carolina jobsites. By each of these acts, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act. In addition, by refusing to consider for hire, and failing and refusing to hire, the above-named applicants, and by changing its hiring practices, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees and applicants for employment, thereby discouraging membership in a labor organization, violating Section 8(a)(3) and (1) of the Act.

By the conduct described above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by refusing to hire or to consider for hire the individuals named above, we shall order the Respondent to expunge from its files any and all references to the unlawful refusal to hire or consider for hire and to notify

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[2] Whether, or the extent to which, an affirmative remedy for the refusal-to-consider violations is warranted will depend on whether the evidence shows that openings were available warranting the more comprehensive remedy of an instatement order for the refusal-to-hire violation. *Budget Heating & Cooling*, 332 NLRB fn. 3 (2000).

Nothing contained in this decision requires a hearing if, in the event of an amendment to the complaint, the Respondent fails to answer, thereby admitting evidence that would permit the Board to resolve the remedial instatement and backpay issue. In such circumstances, the General Counsel may renew the Motion for Summary Judgment with respect to this specific affirmative remedy. See *Center State Beef and Veal Co.*, 330 NLRB 41 (1999).

[3] All subsequent dates are in 1999, unless otherwise stated.

the discriminatees in writing that this has been done.[4] In addition, having found that the Respondent violated Section 8(a)(3) and (1) by changing its hiring policies, we shall order the Respondent to rescind these changes.

ORDER

The National Labor Relations Board orders that the Respondent, Jet Electric Company, Inc., Winston-Salem, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening not to hire employees because of their affiliation with a union.

(b) Threatening to interrogate employees regarding their union affiliation.

(c) Advising employees and applicants that union-affiliated employees would not be hired.

(d) Threatening to discharge employees for their affiliation with a union.

(e) Interrogating employees regarding their union affiliation and membership.

(f) Refusing to consider for hire or to hire applicants because of their affiliation with a union.

(g) Changing its hiring practices and policies in order to deny employment to union-affiliated applicants.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the changes in hiring practices and policies designed to deny employment to union-affiliated applicants.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire or consider for hire Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington, and within 3 days thereafter notify the applicants in writing that this has been done and that the unlawful refusals to hire or consider for hire will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its facilities in Winston-Salem, North Carolina, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 1999.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the issue of how many job openings were available at times relevant to the discriminatees' applications for work is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

CHAIRMAN HURTGEN, dissenting.

I would deny the General Counsel's Motion for Summary Judgment. The Respondent (unrepresented) acknowledged receipt of the amended complaint on March 21, 2000, and—within the time provided by the Region—responded to the amended complaint on March 22. In the March 22 response, the Respondent stated that "I deny all complaints directed at me, James A. Jackson, or my company Jet Electric, Inc." In my view, this constitutes a sufficient denial of the allegations of the complaint. As I previously concluded in *Eckert Fire Protection Co.*, 329 NLRB 920, 923–924 (1999) (dissenting opinion), summary judgment should be denied where, as here, a respondent's response to the complaint "clearly puts the General Counsel's allegations in issue" and constitutes "a sufficient denial to put the General Counsel to his proof at a hearing." See also *Triple H Fire Protection*, 326 NLRB 463, 466 (1998) (dissenting opinion).

I reject my colleagues' claim that the March 22 response is legally insufficient because it assertedly does not address each of the factual or legal allegations of the complaint. It is not uncommon for a represented respondent to simply say "denied" as to each allegation of a complaint. Such denials are routinely accepted. Surely, there is no substantive difference between this and the denial of "all" of the allegations of a complaint. Particularly in a case involving a pro se Respondent, I would not

[4] As previously stated, we shall hold in abeyance the determination of any further appropriate affirmative remedy for the Respondent's refusal-to-hire or consider violations.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

elevate form over substance and thereby deny the Respondent its right to contest the allegations.

In these circumstances I would deny the Motion for Summary Judgment.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten not to hire employees because of their affiliation with a union.

WE WILL NOT threaten to interrogate our employees regarding their union affiliation.

WE WILL NOT advise our employees or applicants that union-affiliated employees will be not hired.

WE WILL NOT Threaten to discharge our employees for their affiliation with a union.

WE WILL NOT interrogate our employees regarding their union affiliation and membership.

WE WILL NOT refuse to consider for hire, or refuse to hire, applicants because of their affiliation with a union.

WE WILL NOT change our hiring practices or policies to deny employment to union-affiliated applicants.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the changes in our hiring practices or policies designed to deny employment to union-affiliated applicants.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire or consider for hire applicants Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington, and WE WILL within 3 days thereafter notify the applicants in writing that this has been done and that the unlawful refusals to hire or consider for hire will not be used against them in any way.

JET ELECTRIC COMPANY, INC.